LIBRARY

AUG 30 1961

JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

October Term, 1961.

## No. 192.

MORRIS C. GOLDBERG, also known as M. C. GOLDBERG,
*Petitioner,*

*v.*

A. ARTHUR TRACY, also known as ARTHUR TRACY,
*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

## BRIEF FOR THE RESPONDENT IN OPPOSITION.

DAVID F. MAXWELL,
1418 Packard Building,
Philadelphia 2, Pa.,
*Attorney for Respondent.*

*Of Counsel:*
LEONARD ZISSU,
OBERMAYER, REBMANN, MAXWELL
AND HIPPEL.

International, 711 So. 50th St., Phila. 43, Pa.

# INDEX.


| | Page |
|---|---|
| STATEMENT OF THE QUESTIONS PRESENTED | 1-2 |
| STATEMENT OF THE CASE | 2-4 |
| ARGUMENT | 5-24 |
| I. Introduction | 5-13 |
| A. The First Counterclaim, in Which Goldberg Attempted to Turn a Friendly Gesture Into a Claim for $50,000 | 5-9 |
| B. The Second Counterclaim, in Which Goldberg Attempted to Convert a Secret Deal With Stevens Into a Claim Against Tracy for a $100,000 Commission | 9-12 |
| 1. As to the release of the $92,000 | 10 |
| 2. As to the alleged agreement for the sale of Tracy's stock | 10-12 |
| C. The Third Counterclaim, in Which Goldberg Attempted to Force Tracy to Reimburse Him for the Expenses of a Florida Trip Which Tracy Made as Goldberg's Guest | 12-13 |
| II. The Record Presents no Substantial or Compelling Reason for This Court to Review the Admission of Exhibit P-3 | 13-16 |
| III. The Record and Opinion Below Establish No Reason for This Court to Review the Narrow Questions of State Law Presented by Goldberg's Objections to the Charge | 17-18 |
| IV. The Cross-Examination Complained of Was Correctly Allowed and Involves No Question Worthy of Review | 18-24 |

## INDEX (Continued).


| | Page |
|---|---|
| A. This Whole Line of Examination Was Relevant to a Specific Substantive Issue Which Goldberg Raised in His Own Testimony and to the General Issue of His Credibility | 19-22 |
| B. This Examination Was Proper Under the Cases | 22-24 |
| CONCLUSION | 24-25 |
| APPELLEE'S SUPPLEMENTAL APPENDIX IN THE COURT OF APPEALS | 1(b) |

## TABLE OF CASES CITED.


| | Page |
|---|---|
| Camps v. New York City Transit Authority, 261 F. 2d 320 (2d Cir. 1958) | 16 |
| Erie R. R. v. Tompkins, 304 U. S. 64 (1938) | 18 |
| Hoffman v. Palmer, 129 F. 2d 976 (2d Cir. 1942) | 15 |
| Lenahan v. Pittston Coal Mining Co., 221 Pa. 626 (1908) | 23 |
| Olsen v. Realty Hotel Corp., 210 F. 2d 785 (2d Cir. 1954) | 17 |
| Palmer v. Hoffman, 318 U. S. 109 (1943), rehrg. den'd 318 U. S. 800 (1943) | 14 |
| Pekelis v. Transcontinental & Western Air, 187 F. 2d 122 (2d Cir. 1951) | 15 |
| Revlon, Inc. v. Buchanan, 271 F. 2d 795 (5th Cir. 1959) | 14 |
| Ruegg v. Fairfield Securities Corp., 308 N. Y. 313, 322-23, 125 N. E. 2d 585 (1955) | 14 |
| U. S. v. Lowe, 234 F. 2d 919 (3d Cir. 1956), cert. den'd 352 U. S. 838 (1956) | 23 |
| U. S. v. Stirone, 168 F. Supp. 490, 500 (W. D. Pa. 1957), aff'd and rehrg. den'd 262 F. 2d 571 (3d Cir. 1958), cert. granted 359 U. S. 978 (1959), reversed on other grounds 361 U. S. 212 (1960) | 23 |


## TABLE OF AUTHORITIES CITED.


| | Page |
|---|---|
| 2 Henry, Penna. Trial Evidence, § 814, pp. 272-76 (1953) | 22 |
| McCormick, Evidence, § 42, pp. 45-46 (1954) | 22 |
| F. R. C. P.: | |
| 46 | 14 |
| 51 | 17 |
| 168 F. Supp. at 500, 501 | 23 |
| Pa. Stat. Ann., tit. 33, § 1; D. C. Code § 12-302 | 11 |
| 62 Stat. 945 (1948) as amended 28 U. S. C. § 1732 | 14 |

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 192.

MORRIS C. GOLDBERG, ALSO KNOWN AS M. C. GOLDBERG,

*Petitioner,*

*v.*

A. ARTHUR TRACY, ALSO KNOWN AS ARTHUR TRACY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## BRIEF FOR THE RESPONDENT IN OPPOSITION.

## STATEMENT OF THE QUESTIONS PRESENTED.

We disagree with petitioner's statement of the ultimate questions which would be presented if the writ of certiorari were allowed, but the only issue now before the court is whether or not a writ should issue in a diversity civil action to review the following matters:

1. Admission of an attorney's office memorandum of a conference as to the terms of a contract to establish the date of the meeting, particularly where no objection was made to the document's status as a business record or to its contents, and petitioner could not have been prejudiced by the ruling.

2. Dismissal by the Court of Appeals of objections to the jury charge which allegedly were based on state law, where the Circuit Court tacitly accepted petitioner's contentions with respect to the requirements of state law and, in effect, held that when considered in light of the entire charge and the whole record the remarks challenged did not violate said rules.

3. Affirmance by the Court of Appeals of the allowance of cross-examination of a party with respect to legal gambling where the District Court held that the subject was relevant and that the witness had opened the matter in his own testimony and where the Circuit Court held further that no prejudice could have been incurred under all the circumstances.

## STATEMENT OF THE CASE.

Tracy sued Goldberg, a former friend and the petitioner here, to recover the sum of $17,500 due on a $25,000 loan made on March 23, 1949 (32a-33a).

Goldberg interposed counterclaims in the total amount of $153,709.41, based on three causes of action:

(a) A claim for $50,000 for services which Goldberg, a businessman, not an attorney, allegedly rendered under an agreement with Tracy in effecting the settlement of a dispute between Tracy and his brother-in-law, Stevens (7a-9a).

(b) A claim for $100,000 for services, allegedly rendered at Tracy's request, in effecting a sale to Stevens of Tracy's interest in a Washington, D. C. apartment development (9a-14a).

(c) A claim for $1,000 due upon a loan to Tracy and for $2,709.41, representing expenses advanced in Tracy's behalf during a trip to Florida in February-March 1949 (5a-6a).

Tracy admitted the $1,000 loan to him and allowed Goldberg a credit which reduced his own claim to $16,500 and interest; Tracy denied any other liability to Goldberg (26a).

At trial, Goldberg admitted the receipt of the $25,000 loan and the amount of his debt to Tracy under the complaint (32a-35a, 335a-337a). Goldberg was the only witness in support of his counterclaims although he contended that material discussions with Tracy upon which the first claim was based occurred in the presence of third persons (51a, 131a-132a), who were disinterested and available to testify. Goldberg produced no documentary evidence.

As to the first counterclaim, Goldberg admitted that he had interceded at the request of, and to accommodate, an important business customer, who was also a friend of Tracy and his family (48a, 50a). Furthermore, it appeared that on May 24, 1949, long after Goldberg allegedly had rendered the services upon which the first two counterclaims were based and after the trip to Florida, he repaid $7,500 to Tracy on account of the $25,000 loan without even mentioning any claim on his own part and that Goldberg indicated his intent to pay the balance, stating in his letter of that date:

"Dear Arthur:

"Am enclosing my check for $7,500. More will follow shortly.

"Regards.

"Sincerely,

"Moe." (Pl. Ex. 2, 416a, 477a, 268a).

Tracy denied Goldberg's testimony in all material respects and in further proof of his defense to the counterclaims submitted documentary evidence and the testimony of disinterested witnesses. (See generally, pp. 5-13, *infra.*)

The jury, after three days of trial, returned verdicts in favor of Tracy, and against Goldberg, on the complaint and each of the three counterclaims (496a-497a).

After judgment was entered on the verdicts, the trial court considered Goldberg's voluminous post trial motions at great length and rejected all of them (573a, 532a-572a). The Court of Appeals unanimously affirmed the judgment below, stating "This was an angry, hard fought trial which the district judge made sure was conducted with fairness to both sides. There is no error here in any way warranting reversal." 289 F. 2d 467, 470 (3d Cir. 1961).

## ARGUMENT.

### I. Introduction.

The merits of the questions raised by Goldberg are considered seriatim below. We contend that he shows no reason for further review of the rulings involved: The Court of Appeals' decision was clearly correct and the narrow questions presented by this record are not even matters of general interest or importance. Indeed, most of the issues were not even properly preserved for review. (See pages 13-24, *infra*.)

But entirely apart from this, it is totally inconceivable to us that Goldberg even ventures to raise these collateral issues here. For as the Court of Appeals noted, this case fundamentally involved sharply defined issues of fact. 289 F. 2d at 470. The jury found against Goldberg because he utterly failed to prove his case by credible evidence, and it is impossible for anyone familiar with the record in this case seriously to believe that the rulings questioned here had the slightest effect on the outcome.

For while Goldberg represents that his Statement of the Case accurately narrates the "facts" of the case, most of what he presents is only factual argument, refuted by the evidence and rejected by the jury. This is what the record actually shows with respect to the merits of his three counterclaims:

#### A. The First Counterclaim, in Which Goldberg Attempted to Turn a Friendly Gesture Into a Claim for $50,000.

In July of 1948, a bitter dispute existed between Tracy and his brother-in-law, Stevens, involving their respective interests in Brentwood Village, an apartment development in Washington, D. C. Goldberg had been a long-time friend of Tracy (35a), and also knew Stevens well, having had

business relations with him (135a-137a). Tracy admitted that Goldberg met with representatives of the parties for two days, during which a settlement was negotiated, but flatly denied that he had promised to pay Goldberg for these services, contending that Goldberg had acted solely as a gratuitous mediator, without any expectation of compensation (238a-240a, 272a). This defense was amply supported not only by Tracy's testimony but also by Goldberg's testimony and the testimony of disinterested witnesses:

1. Goldberg himself revealed that it was George Friedland, President of Food Fair stores and a friend of the Tracy-Stevens clan, who asked him to intervene in the dispute. Goldberg admitted that Food Fair was a valued customer of his own business, and he thus felt an obligation to Friedland and wanted to accommodate him (50a, 142a). This evidence powerfully corroborated Tracy's testimony that someone else brought Goldberg into the picture (238a, 372a) and clearly indicated that insofar as Tracy was concerned, Goldberg rendered any services purely as a friendly volunteer.

2. Goldberg's descriptions of a conversation in which Tracy allegedly had promised to pay him were inconclusive and inconsistent.

First he testified that Tracy merely said, ". . . This is *worth* a hundred thousand dollars to me if you can straighten out these affairs" (55a, 56a). Even accepting the truth of this testimony, these words did not prove an offer: Tracy might well have used the phrase, as an extravagant figure of speech, to emphasize the importance of the matter to him; he also might have referred to the money which he could save if the dispute were settled, since Goldberg testified that it already had cost the parties more than $250,000 (47a, 48a). Indeed, the fact that no offer was intended and that Goldberg could not have understood such words as an offer was also strongly suggested when Gold-

berg admitted that he had previously rendered a number of similar services to Tracy gratuitously, because of their friendship (39a, 42a-44a).

Any possible doubt was removed subsequently when Goldberg drastically changed his testimony on this point:- After he had repeated the version above several times and stated that it was this entire recollection of the conversation, he then testified that Tracy actually said "he [Tracy] will *spend* a hundred thousand dollars and *give* it to me if this thing could be straightened out" (59a, 62a). This important change was made only after an extended colloquy between counsel and the court- in the presence of the witness- had underscored the fatal weakness of Goldberg's prior testimony (57a-59a).

3. Furthermore, while Goldberg testified that Milton Fine, Samuel Kamens and David Yamron were present at the Fines' residence when Tracy made the alleged promise, Goldberg did not produce one of these three men at the trial (52a). More important, when Milton Fine, a disinterested witness, was called by Tracy, he testified unequivocally that Goldberg was not even in his house on the night in question and that he never heard Tracy tell Goldberg that a settlement of the dispute would be worth $100,000 (312a-313a). In fact, Fine testified further that he did not even hear of Goldberg "coming into the picture" until "a couple of weeks" after the weekend of the Friedland party and the date of Goldberg's alleged discussion at the Fine home. Yet Fine was a business associate of Kamens, who was representing Tracy in the negotiations, and Kamens was Fine's house guest during this period (313a, 319a, 235a).

4. Goldberg testified that his services extended between "July the 20th or thereabouts and August 13 or close to it. . . . I was away from my office . . . for days; just didn't show up at my office during that period" (74a-75a).

On cross-examination, Goldberg denied that the only meeting ever held at his apartment in connection with this matter was the one described by Tracy, on August 3-4. Goldberg also claimed that he had devoted "many days and many nights" to the problem (147a-148a).

Yet, the evidence established conclusively that Goldberg's first meeting with the parties' representatives could not have occurred until several days after the alleged Tracy-Goldberg conversation at the Fines, on July 25 (312a, 236a-237a). Goldberg himself indicated that his discussions with Kamens and Katz did not begin until sometime thereafter; and the negotiations definitely were concluded by August 4 (51a, 62a, 236a-237a). Furthermore, the testimony of Tracy and Fine established that the only meetings conducted by Goldberg were confined exclusively to August 3 and August 4 (239a-242a, 313a-314a).

Again it was demonstrated to the jury that Goldberg's uncorroborated generalizations could not be accepted.

5. While Goldberg bottomed his claim on the premise that his services were *rendered for Tracy*, Goldberg himself expressly admitted that it was of no interest to him whether Tracy or Stevens got the better deal in the settlement (75a). Indeed, he conceded that very little was accomplished by the settlement since no one was satisfied with it and the provisions made for management of Brentwood Village were not good business (84a). It was obviously impossible to square these revelations with Goldberg's claims that he was hired by Tracy to advance his personal interests and that Goldberg had rendered Tracy services worth $50,000.

Goldberg himself resolved the conflict—in Tracy's favor—when he admitted, on two occasions, that what he really had sought to accomplish was ". . . to get the relationship between the families on a good solid basis . . ." (84a, 85a).

This testimony established beyond question that this was not a business proposition as far as Goldberg was

concerned and that whatever services he rendered were given without a thought of claiming compensation from Tracy or anyone else. Goldberg's sole objective was to accommodate a customer and to help the families by ending a bitter dispute between brothers-in-law and regardless of the cost to either man. This obvious truth meshed with Tracy's testimony at every point; it made each of Goldberg's foregoing admissions and inconsistencies all the more meaningful.

For Goldberg to contend the collateral matters complained of here had the slightest effect on the outcome of the case, is indeed to ignore reality.

**B. The Second Counterclaim, in Which Goldberg Attempted to Convert a Secret Deal With Stevens Into a Claim Against Tracy for a $100,000 Commission.**

Goldberg claimed $100,000 for allegedly negotiating a sale of Tracy's Brentwood Village stock to Stevens. According to Goldberg, Tracy expressly requested him to seek a deal with Stevens and promised to pay Goldberg $100,000 if the sale could be arranged. As a result of much work by Goldberg, both men agreed to the sale by February 19, 1949. Stevens was to pay Tracy $1,025,000, of which Tracy in turn would pay $100,000 to Goldberg. Stevens also agreed to obtain the release of $92,000 which Brentwood Village Corporation had refused to pay Tracy, notwithstanding the provisions of their August 13 settlement. After Tracy had obtained the $92,000 however, he refused to perform his part of the agreement (91a-97a, 195a-196a).

Tracy's testimony flatly contradicted Goldberg's story. Admittedly, Goldberg did solicit him to sell his stock to Stevens on several occasions during this period, but Tracy never engaged Goldberg to negotiate a sale. To the contrary, Goldberg's proposals were all too low and when Tracy asked Goldberg why he persisted in pressuring him to sell at such prices, Goldberg frankly admitted that Stevens had retained him to obtain Tracy's stock for $925,-

000 and would pay Goldberg $100,000 if he succeeded. Astonished by his friend's treachery, Tracy rejected this price as entirely too low, and no agreement—formal or informal—was ever reached between him and Stevens. As for the $92,000 which the corporation owed Tracy, the release of this money had nothing to do with the suggested stock sale, having been approved well before the February 19 date on which Goldberg allegedly persuaded Stevens to approve the payment (245a-255a, 259a-261a).

Again Tracy's version was powerfully corroborated by the testimony of disinterested witnesses and by documentary evidence.

1. *As to the release of the $92,000.*

The testimony of J. M. Earnest, Esq., a disinterested witness and a reputable Washington, D. C. attorney who had represented Stevens, established that the arrangement by which Brentwood Village Corporation paid this sum to Tracy was consummated on February 11, 1949 and that Goldberg had no part in this transaction. Mr. Earnest testified unequivocally that this agreement was negotiated solely between himself and Tracy's and Stevens' representatives, Kamens and Katz (182a-183a, 163a-164a). Indeed, at the moment Goldberg allegedly was negotiating this matter with Stevens, for Tracy, a check had already been issued by Brentwood and mailed to Tracy (164a, 489a).

2. *As to the alleged agreement for the sale of Tracy's stock.*

Goldberg's claim that an agreement was made but breached by Tracy was rebutted by the evidence at four important points.

(a) There was no evidence that Stevens was a ready, able and willing buyer. Stevens admittedly paid no money at the time the alleged agreement was supposed to have been made nor was any money tendered (200a). At the time the settlement allegedly was to be made, moreover, Stevens already owed Brentwood Village Corporation $300,000 and was heavily in debt (254a). How then could it be

presumed that Stevens could have produced $1,025,000 for Tracy's stock? Goldberg was unable to provide any satisfactory explanation (199a 200a).

(b) Furthermore, Goldberg's descriptions of the terms of the alleged contract between Stevens and Tracy were conflicting, and the arrangement, if made, would have been unenforceable. Thus, it was not clear from Goldberg's testimony whether the arrangement which he purportedly negotiated between Tracy and Stevens was merely an option or was a contract for immediate sale. He described it both ways (95a, 109a).

Moreover, if there was in fact an option, it would have been unenforceable because no consideration was paid. If the arrangement was a contract of sale, it would have been unenforceable under the Statute of Frauds since it was not reduced to writing. Pa. Stat. Ann., tit. 33, § 1; D. C. Code § 12-302.

Goldberg, therefore, would not have been entitled to recover a commission even on his own testimony, because the alleged contract was not binding on Stevens and Tracy. More important, Goldberg's vagueness about the basic terms of his million dollar deal was further proof that no such agreement in fact was made.

(c) The truth of Tracy's testimony that Goldberg actually was retained by Stevens to secure the stock for $925,000 was established beyond question through the introduction of an unsigned agreement, prepared by Stevens or his counsel, which Stevens presented to Tracy at a meeting on February 18, 1949. This agreement would have obligated Tracy to sell his stock to Stevens for $925,000, a figure palpably at variance with the price of $1,025,000 to which Goldberg swore. (See Pl. Ex. 6, 417a; 482a-483a; 250a-251a.)

(d) Furthermore, Goldberg's conduct after the alleged services had been rendered was totally inconsistent with that of a creditor entitled to receive substantial compensation.

Goldberg admitted he never sent a bill to Tracy for either the $50,000 or the $100,000 (206a). Indeed, on March 23, 1949 and within a matter of days after Tracy was supposed to have "reneged" on the deal (106a, 198a-199a), Goldberg borrowed $25,000 from Tracy and agreed to pay it back within a week or two without even mentioning his own claims for $50,000 and $100,000 (106a-107a).

More important, Goldberg repaid Tracy $7,500 on account of the $25,000 loan, on May 24, 1949, and promised to pay the rest soon (220a-221a).

### C. The Third Counterclaim, in Which Goldberg Attempted to Force Tracy to Reimburse Him for the Expenses of a Florida Trip Which Tracy Made as Goldberg's Guest.

This portion of the case involved a simple factual dispute. Goldberg claimed that Tracy accompanied him to Florida in February-March 1949 with the definite prior understanding that he would reimburse Goldberg for half of the total expenses (97a-100a; compare, however, 102a-103a).

Tracy testified, however, that although a friend had suggested that Goldberg merely loan the money to Tracy, Goldberg stated that he would take Tracy to Florida as his guest. Tracy went to Florida with this understanding (256a, 383a-384a). Tracy's relations with Goldberg were still amicable at the time and Goldberg liked to have Tracy, an entertainer, present as an adornment to his entourage (258a-259a).

The first occasion on which Goldberg made any claim for reimbursement of Florida expenses arose about the second week of April 1949, or several weeks after their return from Florida, and then only after Tracy had visited Goldberg in Philadelphia to plead for repayment of the $25,000 loan (264a-266a). Tracy vehemently protested Goldberg's "Indian-giving" (265a). Ultimately Goldberg withdrew his claim, sending Tracy $7,500 on account with-

out further mention of Tracy's "debt" and promising to pay the balance shortly (477a, 268a).

* * *

It was in this context and after a display of such truculence by Goldberg that his own attorney was appalled—that the verdict was rendered against him. (E.g., 53a, 99a-100a, 105a, 424a.)

## II. The Record Presents No Substantial or Compelling Reason for This Court to Review the Admission of Exhibit P-3.

This exhibit was offered as part of the proof that Goldberg was completely incorrect in stating that he was totally involved in settlement negotiations from "July the 20th or thereabouts" to "August 13th or close to it. . . . I was away from my office . . . for days [in connection with the discussions]" (74a-75a; see also 147a-148a, "many days and many nights").

The oral testimony of James M. Earnest, Esq., the Washington attorney who had represented Stevens, was offered to prove, inter alia, that Stevens and Katz, his representative, had conferred with Earnest in regard to the drafting of the settlement agreement on August 5, 1948 (152a-153a). This testimony established that Goldberg did not render any services *after* that date, since he admittedly had no further contact with the settlement after the parties consulted counsel in connection with the drafting of the formal agreement (146a).[1]

In the course of this testimony, Mr. Earnest stated that on August 6, 1948, he prepared an office memorandum of the Katz conference and used it in his preparation of the formal agreement (153a, 156a). This memoradum was produced, and its text corroborated the witness' recollection of the

1. By other evidence Tracy had fixed the earliest date upon which Goldberg could have been brought into the matter as a time several days after July 25, 1948. (See p. 8, *supra*.)

date and subject matter of his discussions with his client and Katz (478a-481a).

Therefore, to forestall any subsequent contention by Goldberg that the witness was incorrect in his recollection of the *date* of the conference, Tracy offered the memorandum in evidence (415a-416a).

Goldberg's only objection to the introduction of the document was that it "was used by Mr. Earnest to refresh his recollection . . . since he testified as to the contents of this memorandum . . . it is not admissible in evidence" (415a). This objection was properly overruled; it completely missed the mark since the trial judge admitted the exhibit as a business record, not as past recollection recorded (548a). Cf. F. R. C. P. 46; *Berlon, Inc. v. Buchanan*, 271 F. 2d 795, 798 (5th Cir. 1959).

Both courts below sustained the rulings of the trial judge and they were clearly correct in so holding. See 62 Stat. 945 (1948) as amended 28 U. S. C. § 1732. Cf. *Ruegg v. Fairfield Securities Corp.*, 308 N. Y. 313, 322-23, 125 N. E. 2d 585, 590-91 (1955) (Attorney's secretary's memorandum of a telephone call). See also cases collected in the opinion below, 289 F. 2d at 470 n. 1.

Here Goldberg attacks the ruling solely upon the narrow ground that the exhibit represents a record of a conference with an attorney, suggesting by quotations from the opinion in *Palmer v. Hoffman*, 318 U. S. 109 (1943), *rehrg. den'd* 318 U. S. 800 (1943), that this court has disqualified all such documents from admission as business records under the federal act. He is plainly mistaken. This court merely held that a railroad could not offer in evidence the account of a crossing accident which its engineer had given to another railroad employee, when the report was offered in behalf of the railroad and in the very litigation with a view to which the statement was taken. The fact that the railroad's internal regulations routinely provided for the making of such reports obviously offered no guarantee of their trustworthiness. As the Court of Appeals put it,

reports made under such circumstances were "dripping with motivations to misrepresent." *Hoffman v. Palmer*, 129 F. 2d 976, 991 (2d Cir. 1942), explained further in *Pekelis v. Transcontinental & Western Air*, 187 F. 2d 122, 130 (2d Cir. 1951). Affirming, this court stated further—

> ". . . it is manifest that . . . those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like these reports are calculated for use essentially in the court not in business. Their primary utility is in litigating, not in railroading." 318 U. S. at 114.

True, that opinion indicated by way of analogy that if the admission of such records were allowed "any law office in the land could follow the same course". But while Goldberg relies heavily on this terse statement it is clear that Justice Douglas was referring only to "records" of the same kind—witness statements taken with an eye to litigation. 318 U. S. at 113-14.

Patently, that decision has no application here. Earnest made the memorandum to guide him in drafting a contract. It merely recorded his client's instructions and, therefore, could not have been made with a thought to subserving Stevens' purposes by offering against others. Nor was it offered for that purpose. The fact that the subject mater of the agreement involved the settlement of litigation no more involves the danger noted in *Palmer* than if this had been an ordinary contract of sale or an employment agreement.

But quite apart from the total lack of merit of Goldberg's argument, it is difficult to understand why he presses the matter. For, as the Court of Appeals noted, the admission of this document did not prejudice him in the slightest. 289 F. 2d at 470. Goldberg is not disputing the date of the Earnest-Katz-Stevens conferences, nor claiming that the terms of agreement recorded by Earnest conflicted with

Goldberg's account of the settlement. Goldberg's entire argument here is based on the notion that his testimony was flatly contradicted by a passage in the memorandum which stated that ". . . Mr. Katz reported to me that he, as a representative of Mr. Stevens and Samuel Kamens, as a representative of Mr. Tracy, had negotiated a compromise settlement between the parties . . ." (see 478a, Petition, p. 10).

This notion is absurd since it totally ignores Goldberg's own testimony on the point: Goldberg himself indicated that he only acted as a mediator and that Kamens and Katz actually were the "negotiators" for the two principals (63a, 62a, 72a). In fact, Goldberg claimed that it was his own idea that Tracy and Stevens should each select such a representative (56a-57a, 65a-66a). It is stretching very far to read the Earnest memorandum to suggest more than this and as stating affirmatively that Goldberg had nothing to do with the settlement. The fact that Goldberg's attorney had no fear that the jury might thus misconstrue the exhibit was demonstrated when he failed to assign this reason in support of his objection to admission and then did not even bother to ask the trial judge to instruct the jury to disregard the passage because the memorandum was offered only to prove the date of the conference in Mr. Earnest's office. See, however, *Camps v. New York City Transit Authority*, 261 F. 2d 320, 322 (2d Cir. 1958) (failure to request deletion or masking of objectionable portion of document waived objection).[2]

---

2. The claim made at page 5 of Goldberg's Petition, that ". . . 'Exhibit P-3' . . . was sent out with the jury over further objection" is not correct. (See 415a-416a, 466a.)

## III. The Record and Opinion Below Establish No Reason for This Court to Review the Narrow Questions of State Law Presented by Goldberg's Objections to the Charge.

The trial judge's charge to the jury was comprehensive, fair and eminently correct. Indeed, Goldberg has found little in it to support his position here. His lengthy argument is based on two sentences, removed from context.

Goldberg suggests that the trial judge gave the jury a definitive instruction that Goldberg had to prove his counterclaim by a "clear" preponderance of the evidence, although the judge only used the adjective once in a lengthy discussion, and argues that under Pennsylvania law it was error to so define the requisite preponderance. Goldberg further contends that the trial judge preempted the jury's function of determining the credibility of witnesses when, in the course of a general discussion of factors which might be considered in determining the credibility and weight of the testimony, the trial judge observed that Fine and Earnest were not interested witnesses and "had no reason not to tell the whole truth" (444a).

These are claims of recent origin since Goldberg's attorney indicated his complete satisfaction with these phases of the charge when he took no exception to them and did not even attempt to raise these questions on post trial motions in the District Court. 289 F. 2d at 468, 469. (See also 462a-464a, 498a-516a and 1b in Supplemental Appendix, *infra*.)

While noting that Goldberg's failure to register timely specific objections, as required by F. R. C. P. 51, barred him from raising these matters on appeal, unless fundamental error were involved,[3] the Court of Appeals nevertheless made a comprehensive review of both contentions in light

---

3. It was not. Cf. *Olsen v. Realty Hotel Corp.*, 210 F. 2d 785, 788 (2d Cir. 1954).

of the entire charge and found them baseless. 289 F. 2d at 468, 469. This decision was manifestly correct.

Not satisfied with this appellate indulgence, Goldberg now has the effrontery to argue that the Court of Appeals reached its position by applying legal standards other than those prescribed by Pennsylvania law and that this was a bold violation of the decision in *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938).

The most casual reading of the Court of Appeals' opinion will show that the basic premise of this argument is untenable. In effect, the court implicitly *accepted* Goldberg's representations as to Pennsylvania law. Its opinion turns on the conclusion, which any Pennsylvania court certainly would have reached under the circumstances, that considered in its entirety the charge in this case did not violate these abstract rules and in context these isolated remarks did not prejudice Goldberg. 289 F. 2d at 468-469.

Therefore, even if the Court of Appeals erred in its conclusions, and it plainly did not, the only question presented by this phase of Goldberg's petition is, at best, whether this court should issue a writ of certiorari to determine two routine questions of state law: (1) whether under Pennsylvania law reversible error is committed if a trial judge, after an elaborate and eminently correct definition of the burden of proof carried by both the plaintiff and counterclaimant, refers once, in passing, to a requirement of a "clear" preponderance of evidence; and (2) whether under Pennsylvania law reversible error is committed if a trial judge accurately characterizes a witness as not interested in the result but clearly leaves the question of his credibility to the jury under a proper charge.

## IV. The Cross-Examination Complained of Was Correctly Allowed and Involves No Question Worthy of Review.

Goldberg's final argument presents his most extravagant claim, that counsel for Tracy deliberately and successfully set out to prejudice the jury against Goldberg by

asking him whether or not he lost $150,000 gambling during his trip to Florida with Tracy and had to borrow $25,000 so that the "bookies" would let him leave town, both of which questions were answered in the negative (425a, 426a).

Two courts have reviewed the merits of this claim and rightly rejected it. Accordingly, Goldberg attempts to bolster his position here by asserting that the Court of Appeals' affirmance directly resulted from another "erroneous" refusal to review the assignment in light of Pennsylvania law.

Once again Goldberg builds a towering legal structure on a tottering base of fact. For when these questions are placed in their proper context of the record of a three day trial the legal question, either under Pennsylvania or federal courts' law, simply disappears: No attempt was made to prejudice Goldberg. In view of all the evidence squarely refuting Goldberg's testimony he could not have been prejudiced. The cross-examination was proper on the record in this case, and Goldberg, indeed, has only himself to thank for the incident.

### A. This Whole Line of Examination Was Relevant to a Specific Substantive Issue Which Goldberg Raised in His Own Testimony and to the General Issue of His Credibility.

Although Goldberg suggests that Tracy introduced this subject into the trial, the controversy really arose from testimony which Goldberg gave on direct examination in chief to establish (1) that he had rendered valuable services to Tracy in connection with the settlement agreement, for which it was only reasonable to expect compensation and (2) to prove the value of these services. Goldberg testified that he was "away from my office . . . for days" between July 20 and August 13, 1948. In his counterclaim he also alleged that he devoted "many days and evenings" to his endeavors in Tracy's behalf (75a, 8a).

During Goldberg's cross-examination, therefore, Tracy's counsel sought to rebut the inferences from this testimony, first by forcing Goldberg to concede that the business was competently managed by other persons in his absence, and then following-up this statement with a suggestion that it was not necessary for Goldberg to attend to the business during absences from Philadelphia (193a). However, Goldberg claimed that he was actively engaged in business affairs, by telephone, even when out of town (193a).

Realizing the relevance of this cross-examination, Goldberg's attorney, on re-direct, attempted to expand on the suggestion that Goldberg had to devote a large amount of time to his business affairs even when away from the office (222a-223a), and in the course of these questions Goldberg was asked how much time he spent on business during his trip to Florida with Tracy (222a-223a).

Therefore, Tracy's counsel subsequently continued his attempt to rebut this testimony by asking Tracy whether Goldberg had to devote a great amount of time to business during their visit to Florida in February-March 1949. Tracy stated that Goldberg spent a great deal of time at the track and at a gambling casino (257a). Certainly, no attempt was made here to attack Goldberg's character or credibility on the ground that he was a gambler. The important point was not that he was gambling during his visit to Florida but that Goldberg was devoting his time to recreation, not to business.

Thus, Goldberg's attorney made no objection. Instead, two days later, opposing counsel *elected to make his own frontal attack with respect to Goldberg's gambling activities*, in order to meet Tracy's testimony as it pertained to the merits and to discredit his credibility. Despite the *restrained and indirect way* in which Goldberg's gambling had been introduced into the case, Goldberg's attorney recalled his client in rebuttal and attempted to make the subject a major issue:

"By Mr. Lipschitz:

"Q. Mr. Goldberg, while you were in Florida, on how many occasions did you go to the race track?

"A. [By Mr. Goldberg] Well, when we were in Palm Beach, Florida, for three weeks out of that total month, I went to the Flamingo Stakes on a Saturday afternoon with a group of people, by train, from one of the local stations above Palm Beach, just the one time.

"Q. Who went with you?

"A. That was for the very, very big race.

"Q. Did Mr. Tracy go with you?

"A. Yes, he did. There were other people at the station that we had met in the hotel, lots of lovely people were going for that very big Flamingo Race. That's the only time I went to the race track from Palm Beach.

"Q. Do you drink, sir?

"A. I certainly do.

"Q. Did Mr. Tracy drink while you were down there.

"A. Much more than I ever could.

"Q. Do you smoke?

"A. I smoke; yes, sir.

"Q. Does Mr. Tracy smoke?

"A. Yes, siree.

"Q. Do you shoot crap occasionally?

"A. I certainly do." (418a-419a)

Following this rebuttal testimony by Goldberg, Tracy's counsel naturally sought to resolve both issues by a series of specific questions intended to show (1) that Goldberg was not a credible witness because, despite his testimony, he actually did devote a substantial amount of time and money to gambling activities while he was in Florida; (2) that Tracy was a credible witness because his version was correct; and (3) to prove that Goldberg's pattern of living during this visit was such that he could not have devoted

any serious attention to business affairs. (See 420a-427a.) The third aspect of the examination was emphasized in the colloquy following this question, in which Tracy's counsel indicated clearly that he was not attempting to explore Goldberg's gambling for the sake of sensation:

> "Q. [By Mr. Maxwell] When did you do all this telephoning to your business, Mr. Goldberg; playing golf, playing gin rummy, swimming in the pool, going to the track. When did you do all this million dollar business with your office?" (421a-422a)

The fact that Goldberg's attorney again understood the purpose of this examination perfectly is demonstrated by the fact that Tracy's counsel had proceeded in this direction for *six pages* in the transcript and the matter was virtually concluded before opposing counsel made any objection to this line of examination (425a). Not even then did he ask for the withdrawal of a juror (mistrial) or even an instruction to the jury to disregard the incident.

**B. This Examination Was Proper Under the Cases.**

The specific questions to which Goldberg objects here were merely part of the series of questions put to him by Tracy's attorney during the foregoing cross-examination. Like the related questions which preceded them, these inquiries definitely were not made in a cynical attempt to prejudice the jury against Goldberg. If both counsel erred in devoting their attention to this point, Goldberg has no one to thank but himself, since it was he who expanded the issue in rebuttal. Like this entire line of the examination, however, these questions were clearly relevant to the foregoing issues of Goldberg's damages, his credibility and Tracy's credibility. *McCormick, Evidence*, § 42, pp. 45-46 (1954); 2 *Henry, Penna. Trial Evidence*, § 814, pp. 272-76 (1953), and cases cited below.

The trial judge held the questions proper for these reasons, and his ruling unquestionably was correct (537a).

Moreover, although Goldberg ignores the point in his brief, the courts have emphasized that the proper scope of cross-examination also includes matters opened up by a party, although not otherwise strictly relevant. *U. S. v. Louie*, 234 F. 2d 919, 922 (3d Cir. 1956), *cert. den'd* 352 U. S. 838 (1956). See also *U. S. v. Stirone*, 168 F. Supp. 490, 500 (W. D. Pa. 1957), *aff'd and rehrg. den'd* 262 F. 2d 571 (3d Cir. 1958), *cert. granted* 359 U. S. 978 (1959), *reversed on other grounds* 361 U. S. 212 (1960).

> "When a party opens up a subject, even though it may not be strictly relevant to the case, he cannot complain on appeal if the other side gives him a Rowland for his Oliver." 243 F. 2d at 922.

Conceding that the questions in this case were within the proper scope of cross-examination, it is clear that Goldberg may not complain of prejudice resulting from an otherwise proper line of inquiry. Once it is established the scope of cross-examination is proper.

> "The right is not to be denied or abridged because incidentally facts may be developed that are irrelevant to the issue and prejudicial to the other party. This chance the party takes when he calls the witness." *Lenahan v. Pittston Coal Mining Co.*, 221 Pa. 626, 629 (1908).

The *Stirone* case, *supra*, provides a striking illustration of this principle. There a union official charged with extortion in violation of the Hobbs Act testified and presented other defense evidence with respect to his humble origins and his status as "a good union man". The government was held entitled to produce, in rebuttal, unsavory evidence with respect to defendant's strong-arm tactics and manipulation of union funds. 168 F. Supp. at 500, 501.

When testimony as harmful as this may be introduced in rebuttal in a criminal case, merely because the defendant has opened the matter, as Goldberg chose to do here—it is

obvious that Goldberg was not improperly prejudiced in this case when he was asked a few questions relating to perfectly lawful conduct, all of which he actually answered in the negative.

Particularly is this true since the trial judge firmly emphasized to the jurors, at length, in his charge, that he expected them to decide the case solely upon the relevant evidence and to ignore all personal considerations (443a). Since the evidence in Tracy's favor was indeed overwhelming, it is hardly surprising that the jury found in his favor, and there is no reason whatever to infer that the jurors ignored these directions.

The Court of Appeals indicated that this was a sufficient answer to Goldberg's contentions. 289 F. 2d at 470.

## CONCLUSION.

When the collateral matters to which Goldberg objects are placed in their true context, his attempt to blame the courts below for his failure to prevail fails completely and it becomes clear that there is no occasion to grant review here. The trial was free from error. Goldberg received an eminently full and fair hearing on the merits of claims which he had never even asserted until he forced Tracy to sue to recover a debt admittedly owed for years. The jury found against Goldberg because he utterly failed to prove his case, and it could not properly have found otherwise. On post trial motions and appeal two courts below exhaustively reviewed and rejected all of Goldberg's myriad and ever-changing assignments of error. Their decisions were correct on the merits and plainly just in light of the whole record.

Quite apart from their merits, moreover, these issues have been presented to this court with a claim that matters of substantial, general importance are involved. Yet they are, in fact, commonplace trial questions, not even properly preserved on the record, which are of interest to no one

except the litigants, intimately related as they are to the particular circumstances and record of the case.

The Petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, therefore, should be denied.

Respectfully submitted,
David F. Maxwell
DAVID F. MAXWELL,
*Attorney for Respondent.*

*Of Counsel:*

LEONARD ZISSU,
OBERMAYER, REBMANN, MAXWELL AND HIPPEL.

## APPELLEE'S SUPPLEMENTAL APPENDIX.*

---

**Portion of Defendant's Brief in Support of Motion for New Trial (pp. 8-9 of Doc. No. 23 in Clerk's File).**

The defendant has filed some 36 reasons for a new trial. A number of these are not pressed here for argument. Those presented in support of the present motion for a new trial are classified as follows:

• • •

D. *Error in the Charge of the Court.*

(1) Reason No. 31—Instructing the jury that failure of Tracy to conclude agreement to sell stock barred recovery of damages or compensation by Goldberg.

E. *Excessive Participation by Court in Trial During Cross-examination of Tracy.*

• • •

---

* Under the rules of the Court of Appeals for the Third Circuit this Appendix was bound as part of Appellee's brief. Hence this page has been reprinted in its entirety.